PROPERTY AND SOVEREIGNTY*

MORRIS R. COHEN†

Property and sovereignty, as every student knows, belong to entirely different branches of the law. Sovereignty is a concept of political or public law and property belongs to civil or private law. This distinction between public and private law is a fixed feature of our law-school curriculum. It was expressed with characteristic 18th century neatness and clarity by Montesquieu, when he said that by political laws we acquire liberty and by civil law property, and that we must not apply the principles of one to the other.[1] Montesquieu's view that political laws must in no way retrench on private property because no public good is greater than the maintenance of private property, was echoed by Blackstone and became the basis of legal thought in America. Though Austin, with his usual prolix and near-sighted sincerity, managed to throw some serious doubts on this classical distinction,[2] it has continued to be regarded as one of the fixed divisions of the jural field. In the second volume of his *Genossenschaftsrecht* the learned Gierke treated us to some very interesting speculations as to how the Teutons became the founders of public law just as the Romans were the founders of private law. But in later years he somewhat softened this sharp distinction;[3] and common law lawyers are inclined rather to regard the Roman system as giving more weight to public than to private law.

The distinction between property and sovereignty is generally identified with the Roman discrimination between *dominium*, the rule over things by the individual, and *imperium*, the rule over all

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*A lecture delivered at the Cornell Law School, under the Frank Irvine Lectureship of the Phi Delta Phi Foundation, April thirtieth, nineteen hundred and twenty-seven.

†Professor of Philosophy, College of the City of New York.

[1] L'ESPRIT DES LOIS, Bk. XXVI, c. 15.

[2] JURISPRUDENCE, Lect. 44.

[3] I HOLTZENDORF-KOHLER ENCYKLOPÄDIE 179–180. Continental jurists generally regard the Roman law as more individualistic and less social than the Germanic law. *Cf.* III JHERING GEIST 311; BESELER-DEUT, PRIVATRECHT § 81; GIERKE, XII SCHMOLLER'S JAHRBUCH 875; MENGER, II ARCHIV FUR SOCIALE GESETZGEB 430; RAMBAUD, I CIVILISATION FRANCAISE 13; D'Arbois de Jubainville in *Acad. Inscriptions*, Feb. 1887. This seems also the view of Maine, ANCIENT LAW 228. Maitland's remarks that the whole constitutional history of England seems at times to be but an appendix to the laws of real property (MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND (1911) 536), only echoes the prevailing French attitude that their Civil Code is their real constitution.

individuals by the prince. Like other Roman distinctions, this has been regarded as absolutely fixed in the nature of things. But early Teutonic Law, the law of the Anglo-Saxons, Franks, Visigoths, Lombards and other tribes, makes no such distinction; and the state long continued to be the prince's estate so that even in the 18th century the Prince of Hesse could sell his subjects as soldiers to the King of England. The essence of feudal law—a system not confined to medieval Europe—is the inseparable connection between land tenure and personal homage involving often rather menial services on the part of the tenant and always genuine sovereignty by the landlord.

The feudal baron had, for instance, the right to determine the marriage of the ward, as well as the right to nominate the priest; and the great importance of the former as a real property right is amply attested in *Magna Carta* and in the *Statute Quia Emptores*. Likewise was the administration of justice in the baron's court an incident of land ownership; and if, unlike the French up to the Revolution, the English did not regard the office of judge as a revenue-producing incident of seigniorage to be sold in the open market (as Army Commissions were up to the time of Gladstone) the local squire did in fact continue to act as Justice of the Peace. Ownership of the land and local political sovereignty were inseparable.

Can we dismiss all this with the simple exclamation that all this is medieval and we have long outgrown it?

Well, right before our eyes the Law of Property Act of 1925 is sweeping away substantial remains of the complicated feudal Land Laws of England, by abolishing the difference between the descent of real and that of personal property, and by abolishing all legal (though not equitable) estates intermediate between leaseholds and fees simple absolute. These remains of feudalism have not been mere vestiges. They have played an important part in the national life of England. Their absurdities and indefensible abuses were pilloried with characteristic wit and learning by the peerless Maitland. The same thing had been done most judiciously by Joshua Williams, the teacher of several generations of English lawyers brought up on the seventeen editions of his great text book on Real Property Law. Yet these and similar efforts made no impression on the actual law. What these great men did not see with sufficient clearness, was that back of the complicated law of settlement, fee-tails, copyhold estates, of the heir-at-law, of the postponement of women, and other feudal incidents, there was a great and well founded fear that by simplifying and modernizing the real property law of England the land might

become more marketable. Once land becomes fully marketable it can no longer be counted on to remain in the hands of the landed aristocratic families; and this means the passing of their political power and the end of their control over the destinies of the British Empire. For if American experience has demonstrated anything, it is that the continued leadership by great families cannot be as well founded on a money as on a land economy. The same kind of talent which enables Jay Gould to acquire dominion over certain railroads enables Mr. Harriman to take it away from his sons. From the point of view of an established land economy, a money economy thus seems a state of perpetual war instead of a social order where son succeeds father. The motto that a career should be open to talent thus seems a justification of anarchy, just as the election of rulers (kings or priests) seems an anarchic procedure to those used to the regular succession of father by son.

That which was hidden from Maitland, Joshua Williams, and the other great ones, was revealed to a Welsh solicitor who in the budget of 1910 proposed to tax the land so as to force it on the market. The radically revolutionary character of this proposal was at once recognized in England. It was bitterly fought by all those who treasured what had remained of the old English aristocratic rule. When this budget finally passed, the basis of the old real property law and the effective power of the House of Lords was gone. The Legislation of 1925–6 was thus a final completion in the realm of private law of the revolution which was fought in 1910 in the forum of public law, *i. e.*, in the field of taxation and the power of the House of Lords.

As the terms "medievalism" and "feudalism" have become with us terms of approbrium, we are apt to think that only unenlightened selfishness has up to recently prevented English land law from cutting its medieval moorings and embarking on the sea of purely money or commercial economy. This light-hearted judgment, however, may be somewhat sobered by reflection on a second recent event—the Supreme Court decision on the Minimum Wage Law. Without passing judgment at this point on the soundness of the reasoning, whereby the majority reached its decision, the result may still fairly be characterised as a high water mark of law in a purely money or commercial economy. For by that decision private monetary interests receive precedence over the sovereign duty of the state to maintain decent standards of living.

The state, which has an undisputed right to prohibit contracts against public morals or public policy, is here declared to have no

right to prohibit contracts under which many receive wages less than the minimum of subsistence, so that if they are not the objects of humiliating public or private charity, they become centres of the physical and moral evils that result from systematic underfeeding and degraded standards of life. Let me repeat I do not wish here to argue the merits or demerits of the minimum wage decision. Much less am I concerned with any quixotic attempt to urge England to go back to medievalism. But the two events together show in strong relief how recent and in the main exceptional is the extreme position of the *laissez faire* doctrine, which according to the insinuation of Justice Holmes, has led the Supreme Court to read Herbert Spencer's extreme individualism into the 14th amendment, and according to others, has enacted Cain's motto, "Am I my brother's keeper" as the supreme law of industry. Dean Pound has shown that in making a property right out of the freedom to contract, the Supreme Court has stretched the meaning of the term property to include what it has never before signified in the law or jurisprudence of any civilized country. But whether this extentsion is justified or not, it certainly means the passing of a certain domain of sovereignty from the state to the private employer of labor, who now has the absolute right to discharge and threaten to discharge any employee who wants to join a trade union, and the absolute right to pay a wage which is injurious to a basic social interest.

It may be that economic forces will themselves correct the abuse which the Supreme Court does not allow the state to remove directly, that economic forces will eliminate parasitic industries which do not pay the miniumum of subsistence, because such industries are not as economically efficient and profitable as those that pay higher wages. It was similarly argued that slavery was bound to disappear on account of its economic inefficiency. Meanwhile, however, the sovereignty of the state is limited by the manner in which the courts interpret the term "property" in the 5th and 14th amendment to the Federal Constitution and in the bills of rights in our state constitutions. This makes it imperative for us to consider the nature of private property with reference to the sovereign power of the state to look after the general welfare. A dispassionate scientific study of this requires an examination of the nature of property, its justification, and the ultimate meaning of the policies based on it.

I

Property as Power

Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things

but certain rights. In the world of nature apart from more or less organized society, there are things but clearly no property rights.

Further reflection shows that a property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals. This becomes unmistakably clear if we take specifically modern forms of property such as franchises, patents, good will, etc., which constitute such a large part of the capitalized assets of our industrial and commercial enterprises.

The classical view of property as a right over things resolves it into component rights such as the *jus utendi*, *jus disponendi*, etc. But the essence of private property is always the right to exclude others. The law does not guarantee me the physical or social ability of actually using what it calls mine. By public regulations it may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want. If Laban has the sole disposal of his daughters and his cattle, Jacob must serve him if he desires to possess them. In a regime where land is the principal source of obtaining a livelihood, he who has the legal right over the land receives homage and service from those who wish to live on it.

The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment. But not only is there actually little freedom to bargain on the part of the steel worker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord. Today I do not directly serve my landlord if I wish to live in the city with a roof over my head, but I must work for others to pay him rent with which he obtains the personal services of others. The money needed for purchasing things must for the vast majority be acquired by hard labor and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.

To a philosopher this is of course not at all an argument against private property. It may well be that compulsion in the economic as well as the political realm is necessary for civilized life. But we must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings.

The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence the ownership of land and machinery, with the rights of drawing rent, interest, etc. determines the future distribution of the goods that will come into being—determines what share of such goods various individuals shall acquire. The average life of goods that are either consumable or used for production of other goods is very short. Hence a law that merely protected men in their possession and did not also regulate the acquisition of new goods would be of little use.

From this point of view it can readily be seen that when a court rules that a gas company is entitled to a return of 6% on its investment, it is not merely protecting property already possessed, it is also determining that a portion of the future social produce shall under certain conditions go to that company. Thus not only medieval landlords but the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty.

Though the sovereign power possessed by the modern large property owners assumes a somewhat different form from that formerly possessed by the lord of the land, they are not less real and no less extensive. Thus the ancient lord had a limited power to control the modes of expenditure of his subjects by direct sumptuary legislation. The modern captain of industry and of finance has no such direct power himself, though his direct or indirect influence with the legislature may in that respect be considerable. But those who have the power to standardize and advertise certain products do determine what we may buy and use. We cannot well wear clothes except within lines decreed by their manufacturers, and our food is

becoming more and more restricted to the kinds that are branded and standardized.

This power of the modern owner of capital to make us feel the necessity of buying more and more of his material goods (that may be more profitable to produce than economical to use) is a phenomenon of the utmost significance to the moral philosopher. The moral philosopher must also note that the modern captain of industry or finance exercises greater influence in setting the fashion of expenditure by his personal example. Between a landed aristocracy and their tenants, the difference is sharp and fixed, so that imitation of the former's mode of life by the latter is regarded as absurd and even immoral. In a money or commercial economy differences of income and mode of life are more gradual and readily hidden so that there is great pressure to engage in lavish expenditure in order to appear in a higher class than one's income really allows. Such expenditure may even advance one's business credit. This puts pressure not merely on ever greater expenditure but more specifically on expenditure for ostentation rather than for comfort. Though a landed aristocracy may be wasteful in keeping large tracts of land for hunting purposes, the need for discipline to keep in power compels the cultivation of a certain hardihood which the modern wealthy man can ignore. An aristocracy assured of its recognized superiority need not engage in the race of lavish expenditure regardless of enjoyment.

In addition to these indirect ways in which the wealthy few determine the mode of life of the many, there is the somewhat more direct mode which bankers and financiers exercise when they determine the flow of investment, *e. g.*, when they influence building operations by the amount that they will lend on mortgages. This power becomes explicit and obvious when a needy country has to borrow foreign capital to develop its resources.

I have already mentioned that the recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have. For the most part men prefer to obey and let others take the trouble to think out rules, regulations and orders. That is why we are always setting up authorities; and when we cannot find any we write to the newspaper as the final arbiter. While, however, government is a necessity, not all forms of it are of equal value. At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.

To do this, let us begin with a consideration of the usual justifications of private property.

II

THE JUSTIFICATION OF PROPERTY

1. *The Occupation Theory*

The oldest and up to recently the most influential defense of private property was based on the assumed right of the original discoverer and occupant to dispose of that which thus became his. This view dominated the thought of Roman jurists and of modern philosophers—from Grotius to Kant—so much so that the right of the laborer to the produce of his work was sometimes defended on the ground that the laborer "occupied" the material which he fashioned into the finished product.

It is rather easy to find fatal flaws in this view. Few accumulations of great wealth were ever simply found. Rather were they acquired by the labor of many, by conquest, by business manipulation, and by other means. It is obvious that today at any rate few economic goods can be acquired by discovery and first occupancy.[4] Even in the few cases when they are, as in fishing and trapping, we are apt rather to think of the labor involved as the proper basis of the property acquired. Indeed, there seems nothing ethically self-evident in the motto that "findings is keepings." There seems nothing wrong in a law that a treasure trove shall belong to the king or the state rather than to the finder. Shall the finder of a river be entitled to all the water in it?

Moreover, even if we were to grant that the original finder or occupier should have possession as against anyone else, it by no means follows that he may use it arbitrarily or that his rule shall prevail indefinitely after his death. The right of others to acquire the property from him by bargain, by inheritance, or by testamentary disposition, is not determined by the prineiple of occupation.

Despite all these objections, however, there is a kernel of positive value in this principle. Protecting the discoverer or first occupant, is really part of the more general principle that possession as such should be protected. There is real human economy in doing so until somebody shows a better claim than the possessor. It makes for certainty and security of transaction as well as for public peace—provided the law is ready to set aside possession acquired in ways that are inimical to public order. Various principles of justice may determine the distribution of goods and the retribution to be made for acts of injustice. But the law must not ignore the principle of

[4]In granting patents, copyrights, etc., the principle of reward for useful work or to encourage productivity seems so much more relevant that the principle of discovery and first occupancy seems to have little force.

inertia in human affairs. Continued possession creates expectations in the possessor and in others and only a very poor morality would ignore the hardship of frustrating these expectations and rendering human relations insecure, even to correct some old flaws in the original acquisition. Suppose some remote ancestor of yours did acquire your property by fraud, robbery or conquest, *e. g.* in the days of William of Normandy. Would it be just to take it away from you and your dependents who have held it in good faith? Reflection on the general insecurity that would result from such procedure leads us to see that as habit is the basis of individual life, continued practice must be the basis of social procedure. Any form of property which exists has therefore a claim to continue until it can be shown that the effort to change it is worth while. Continual changes in property laws would certainly discourage enterprise.

Nevertheless, it would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed. No less a philosopher than Aristotle argued against changing even bad laws, lest the habit of obedience be thereby impaired. There is something to be said for this, but only so long as we are in the realm of merely mechanical obedience. When we introduce the notion of free or rational obedience, Aristotle's argument loses its force in the political realm; and similar considerations apply to any property system that can claim the respect of rational beings.

2. *The Labor Theory.*

That everyone is entitled to the full produce of his labor is assumed as self-evident by both socialists and conservatives who believe that capital is the result of the savings of labor. However, as economic goods are never the result of any one man's unaided labor, our maxim is altogether inapplicable. How shall we determine what part of the value of a table should belong to the carpenter, to the lumberman, to the transport worker, to the policeman who guarded the peace while the work was being done, and to the indefinitely large numbers of others whose cooperation was necessary? Moreover, even if we could tell what any one individual has produced—let us imagine a Robinson Crusoe growing up all alone on an island and in no way indebted to any community—it would still be highly questionable whether he has a right to keep the full produce of his labor when some shipwrecked mariner needs his surplus food to keep from starving.

In actual society no one ever thinks it unjust that a wealthy old bachelor should have part of his presumably just earnings taken away in the form of a tax for the benefit of other people's children, or that one immune to certain diseases, should be taxed to support hospitals, etc. We do not think there is any injustice involved in such cases because social interdependence is so intimate that no man can justly say: "This wealth is entirely and absolutely mine as the result of my own unaided effort."

The degree of social solidarity varies, of course; and it is easy to conceive of a sparsely settled community, such as Missouri at the beginning of the 19th century, where a family of hunters or isolated cultivators of the soil might regard everything which it acquired as the product of its own labor. Generally, however, human beings start with a stock of tools or information acquired from others and they are more or less dependent upon some government for protection against foreign aggression, etc.

Yet despite these and other criticisms, the labor theory contains too much substantial truth to be brushed aside. The essential truth is that labor has to be encouraged and that property must be distributed in such a way as to encourage ever greater efforts at productivity.

As not all things produced are ultimately good, as even good things may be produced at an unjustified expense in human life and worth, it is obvious that other principles besides that of labor or productivity are needed for an adequate basis or justification of any system of property law. We can only say dialectically that all other things being equal, property should be distributed with due regard to the productive needs of the community. We must, however, recognize that a good deal of property accrues to those who are not productive,[5] and a good deal of productivity does not and perhaps should not receive its reward in property. Nor should we leave this theme without recalling the Hebrew-Christian view—and for that matter, the specifically religious view—that the first claim on property is by the man who needs it rather than the man who has created it. Indeed, the only way of justifying the principle of distribution of property according to labor is to show that it serves the larger social need.

The occupation theory has shown us the necessity for security of possession and the labor theory the need for encouraging enterprise. These two needs are mutually dependent. Anything which dis-

[5]Economists often claim that the unearned increment is the greatest source of wealth. See Bull. of Am. Econ. Ass'n (4th ser., No. 2) 542 ff.

courages enterprise makes our possessions less valuable, and it is obvious that it is not worth while engaging in economic enterprise if there is no prospect of securely possessing the fruit of it. Yet there is also a conflict between these two needs. The owners of land, wishing to secure the continued possession by the family, oppose laws which make it subject to free financial transactions or make it possible that land should be taken away from one's heirs by a judgment creditor for personal debts. In an agricultural economy security of possession demands that the owner of a horse should be able to reclaim it no matter into whose hands it has fallen. But in order that markets should be possible, it becomes necessary that the innocent purchaser should have a good title. This conflict between static and dynamic security has been treated most suggestively by Demogue and I need only refer you to his masterly book, "*Les Notions fondementales du Droit privé.*"

3. *Property and Personality*

Hegel, Ahrens, Lorimer, and other idealists have tried to deduce the right of property from the individual's right to act as a free personality. To be free one must have a sphere of self-assertion in the external world. One's private property provides such an opportunity.

Waiving all traditional difficulties in applying the metaphysical idea of freedom to empirical legal acts, we may still object that the notion of personality is too vague to enable us to deduce definite legal consequences by means of it. How, for example, can the principle of personality help us to decide to what extent there shall be private rather than public property in railroads, mines, gas-works, and other public necessities?

Not the extremest communist would deny that in the interest of privacy certain personal belongings such as are typified by the toothbrush, must be under the dominion of the individual owner, to the absolute exclusion of everyone else. This, however, will not carry us far if we recall that the major effect of property in land, in the machinery of production, in capital goods, etc., is to enable the owner to exclude others from *their necessities*, and thus to compel them to serve him. Ahrens, one of the chief expounders of the personality theory, argues "It is undoubtedly contrary to the right of personality to have persons dependent on others on account of material goods."[6] But if this is so, the primary effect of property on a large scale is to limit freedom, since the one thing that private

[6]II COURS DE DROIT NATUREL (6th ed.) 108.

property law does not do is to guarantee a minimum of subsistence or the necessary tools of freedom to everyone. So far as a regime of private property fails to do the latter it rather compels people to part with their freedom.

It may well be argued in reply that just as restraining traffic rules in the end give us greater freedom of motion, so, by giving control over things to individual property owners, greater economic freedom is in the end assured to all. This is a strong argument, as can be seen by comparing the different degrees of economic freedom that prevail in lawless and in law abiding communities. It is, however, an argument for legal order rather than any particular form of government or private property. It argues for a regime where every one has a definite sphere of rights and duties, but it does not tell us where these lines should be drawn. The principle of freedom of personality certainly cannot justify a legal order wherein a few can, by virtue of their legal monopoly over necessities, compel others to work under degrading and brutalizing conditions. A government which limits the right of large land-holders limits the rights of property and yet may promote real freedom. Property owners, like other individuals, are members of a community and must subordinate their ambition to the larger whole of which they are a part. They may find their compensation in spiritually identifying their good with that of the larger life.

4. *The Economic Theory*

The economic justification of private property is that by means of it a maximum of productivity is promoted. The classical economic argument may be put thus: The successful business man, the one who makes the greatest profit, is the one who has the greatest power to foresee effective demand. If he has not that power his enterprise fails. He is therefore, in fact, the best director of economic activities.

There can be little doubt that if we take the whole history of agriculture and industry, or compare the economic output in countries like Russia with that in the United States, there is a strong *prima facie* case for the contention that more intensive cultivation of the soil and greater productiveness of industry prevail under individual ownership. Many *a priori* psychologic and economic reasons can also be brought to explain why this must be so, why the individual cultivator will take greater care not to exhaust the soil, etc. All this, however, is so familiar that we may take it for granted and look at the other side of the case, at the considerations which show that there is a difference between socially desirable productivity and the desire for individual profits.

In the first place let us note that of many things the supply is not increased by making them private property. This is obviously true of land in cities and of other monopoly or limited goods. Private ownership of land does not increase the amount of rainfall, and irrigation works to make the land more fruitful have been carried through by government more than by private initiative. Nor was the productivity of French or Irish lands reduced when the property of their landlords in rent charges and other incidents of seigniorage was reduced or even abolished. In our own days, we frequently see tobacco, cotton or wheat farmers in distress because they have succeeded in raising too plentiful crops; and manufacturers who are well-informed know when greater profit is to be made by a decreased output. Patents for processes which would cheapen the product are often bought up by manufacturers and never used. Durable goods which are more economic to the consumer are very frequently crowded out of the market by shoddier goods which are more profitable to produce because of the larger turnover. Advertising campaigns often persuade people to buy the less economical goods and to pay the cost of the uneconomic advice.

In the second place, there are inherent sources of waste in a regime of private enterprise and free competition. If the biologic analogy of the struggle for existence were taken seriously, we should see that the natural survival of the economically fittest is attended, as in the biologic field, with frightful wastefulness. The elimination of the unsuccessful competitor may be a gain to the survivor but all business failures are losses to the community.

Finally, a regime of private ownership in industry is too apt to sacrifice social interests to immediate monetary profits. This shows itself in speeding up industry to such a pitch that men are exhausted in a relatively few years whereas a slower expenditure of their energy would prolong their useful years. It shows itself in the way in which private ownership enterprise has wasted a good deal of the natural resources of the United States to obtain immediate profits. Even when the directors of a modern industrial enterprise see the uneconnomic consequences of immediate profits, the demand of shareholders of immediate dividends,[7] and the ease with which men can desert a business and leave it to others to stand the coming losses, all tend to encourage ultimately wasteful and uneconomic activity. Possibly

[7]Thus the leading brewers doubtless foresaw the coming of prohibition and could have saved millions in losses by separating their interests from that of the saloon. But the large temporary loss involved in such an operation was something that stockholders could never have agreed to.

the best illustration of this is child labor, which by lowering wages increases immediate profits, but in the end is really wasteful of the most precious wealth of the country, its future manhood and womanhood.

Surveying our arguments thus far: We have seen the roots of property in custom and in the need for economic productivity, in individual needs of privacy and in the need for social utility. But we have also noted that property, being only one among other human interests, cannot be pursued absolutely without detriment to human life. Hence we can no longer maintain Montesquieu's view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain. The issue before thoughtful people is therefore not the maintenance or abolition of private property, but the determination of the precise lines along which private enterprise must be given free scope and where it must be restricted in the interests of the common good.

III

Limitations of Property Rights

The traditional theory of rights, and the one that still prevails in this country, was molded by the struggle in the 17th and 18th centuries against restrictions on individual enterprise. These restrictions in the interest of special privilege were fortified by the divine (and therefore absolute) rights of kings. As is natural in all revolts, absolute claims on one side were met with absolute denials on the other. Hence the theory of the natural rights of the individual took not only an absolute but a negative form; men have *in*alienable rights, the state must never interfere with private property, etc. The state, however, must interfere in order that individual rights should become effective and not degenerate into public nuisances. To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property. Unfortunately, however, whether because of the general decline of juristic philosophy after Hegel or because law has become more interested in defending property against attacks by socialists, the doctrine of natural rights has remained in the negative state and has never devcloped into a doctrine of the positive contents of rights.[8]

[8]Thus our courts are reluctant to admit that rules against unfair competition may be in the interest of the general public and not merely for those whose immediate property interests are directly affected. Levy v. Walker, 10 Ch. D. 436 (1878); American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 285 (C.C.A. 6th, 1900); Dickenson v. N.R.Co., 76 W.Va. 148, 151, 85 S. E. 71(1915).

Lawyers occupied with civil or private law have in any case continued the absolutistic conception of property; and in doing this, they are faithful to the language of the great 18th century codes, the French, Prussian, and Austrian, and even of 19th century codes like the Italian and German which also begin with a definition of property as absolute or unlimited though they subsequently introduce qualifying or limiting provisions.[9]

As, however, no individual rights can in fact be exercised in a community, except under public restriction, it has been left mainly to publicists,[10] to writers on politics and constitutional and administrative law to consider the limitations of private property necessary for public safety, peace, health, and morals, as well as in the interest of all those enterprises like housing, education, the preservation of natural resources, etc. which the community finds it necessary to entrust to the state rather than to private hands. The fact, however, that in the United States the last word on law comes from judges, who, like other lawyers, are for the most part, trained in private rather than in public law, is one of the reasons why with us traditional conceptions of property prevail over obvious national interests such as the freedom of laborers to organize, the necessity of preserving certain standards of living, of preventing the future manhood and womanhood of the country from being sacrificed to individual profits, and the like. Our students of property law need, therefore, to be reminded that not only has the whole law since the industrial revolution shown a steady growth in ever new restrictions under use of private property, but that the ideal of absolute *laissez faire* has never in fact been completely operative.

(1) Living in a free land economy we have lost the sense of how exceptional in the history of mankind is the absolutely free power of directing what shall be done with our property after our death. In the history of the common law, wills as to land begin only in the reign of Henry VIII. On the continent it is still restrained by the system of the reserve. In England no formal restriction has been necessary because of the system of entails or strict settlement. Even in the United States, we have kept such rules as that against perpetuities which is certainly a restraint on absolute freedom of testamentary disposition.

[9]French Civil Code, § 544; Prussian Landrecht I, 8, § 1; Austrian General Civil Code, 354; German Civil Code, § 903; Italian Civil Code, § 436. *Cf.* Markby El. of Law, § 310; Aubry & Rann, § 190.

[10]The great Jhering is an honorable exception. The distinction between property for use and property for power was developed by the Austrian jurist, A. Menger, and made current by the German economist, Ad. Wagner.

Even as to the general power of alienating the land *inter vivos* history shows that some restrictions are always present. The persistence of dower rights in our own individualistic economy is a case in point. Land and family interest have been too closely connected to sacrifice the former completely to pure individualism. Though the interests of free exchange of goods and services have never been as powerful as in the last century, governments have not abandoned the right to regulate the rate of interest to be charged for the use of money, or to fix the price of certain other services of general public importance, *e. g.* railway rates, grain-elevators and warehouse charges, etc. The excuse that this applies only to business affected with a public interest, is a very thin one. What large business is there in which the public has not a real interest? Is coal less a public affair than gas, or electricity? Courts and conservative lawyers sometimes speak as if the regulation of wages by the state were a wild innovation which would upset all economic order as well as our legal tradition. Yet the direct regulation of wages has been a normal activity of English law; and we in fact regulate it indirectly by limiting hours of work, prohibiting payment in truck, enforcing certain periodic payments, etc.; and under the compensation acts the law compels an employer to pay his laborer when the latter cannot work at all on account of some accident.

(2) More important than the foregoing are limitations of the use of property. Looking at the matter realistically few will question the wisdom of Holdsworth's remarks, that "at no time can the state be wholly indifferent to the use which the owners make of their property."[11] There must be restrictions on the use of property not only in the interests of other property owners but also in the interests of the health, safety, religion, morals, and general welfare of the whole community. No community can view with indifference the exploitation of the needy by commercial greed. As under the conditions of crowded life, the reckless or unconscionable use of one's property is becoming more and more dangerous, enlightened jurists find new doctrines to limit the abuse of ancient rights. The French doctrine of *abus de droit*, the prohibition of Chicanery in the German Civil Code, and the rather vague use of malice in the common law are all efforts in that direction.[12]

(3) Of greatest significance is the fact that in all civilized legal systems there is a great deal of just expropriation or confiscation

[11]HOLDSWORTH, 8 HISTORY OF ENGLISH LAW (1926), c. 4.

[12]ROUSSEL, L'ABUS DU DROIT. German Civil Code, § 226; Walton in 22 HARV. L. REV 501.

without any direct compensation. This may sound shocking to those who think that for the state to take away the property of the citizen is not only theft or robbery but even worse, an act of treachery, since the state avowedly exists to protect people in those very rights.

As a believer in natural rights, I believe that the state can, and unfortunately often does, enact unjust laws. But I think it is a sheer fallacy based on verbal illusion to think that the rights of the community against an individual owner are no better than the rights of a neighbor. Indeed, no one has in fact had the courage of this confusion to argue that the state has no right to deprive an individual of property to which he is so attached that he refuses any money for it. Though no neighbor has such a right the public interest often justly demands that a proprietor shall part with his ancestral home to which he may be attached by all the roots of his being.

When taking away a man's property, is the state always bound to pay a direct compensation? I submit that while this is generally advisable in order not to disturb the general feeling of security, no absolute principle of justice requires it. I have alluded before to the fact that there is no injustice in taxing an old bachelor to educate the children of others, or to tax one immune to typhoid for the construction of sewers or other sanitary measures. We may go farther and say that the whole business of the state depends upon its rightful power to take away the property of some (in the form of taxation) and use it to support others, such as the needy, those invalided in the service of the state in war or peace, and those who are not yet able to produce but in whom the hope of humanity is embodied. Doubtless, taxation and confiscation may be actuated by malice and may impose needless and cruel hardship on some individuals or classes. But this is not to deny that taxation and confiscation are within the just powers of the state. A number of examples may make this clearer.

(a) Slavery. When slavery is abolished by law, the owners have their property taken away. Is the state ethically bound to pay them the full market value of their slaves? It is doubtless a grievous shock to a community to have a large number of slave owners whose wealth often makes them leaders of culture, suddenly deprived of their income. It may also be conceded that it is not always desirable for the slave himself to be suddenly taken away from his master and cut adrift on the sea of freedom. But when one reads of the horrible ways in which some of those slaves were violently torn from their homes in Africa and shamelessly deprived of their human rights, one is inclined to agree with Emerson that compensa-

tion should first be paid to the slaves. This compensation need not be in the form of a direct bounty to them. It may be more effectively paid in the form of rehabilitation and education for freedom; and such a charge may take precedence over the claims of the former owners. After all, the latter claims are no greater than those of a protected industry when the tariff is removed. If the state should decide that certain import duties, *e. g.* those on scientific instruments, or hospital supplies, are unjustified and proceed to abolish them, many manufacturers may suffer. Are they entitled to compensation by the state?

It is undoubtedly for the general good to obviate as much as possible the effect of economic shock to a large number of people. The routine of life prospers on security. But when that security contains a large element of injustice the shock of an economic operation by law may be necessary and ethically justified.

This will enable us to deal with other types of confiscation.

(b) Financial loss through the abolition of public office. It is only in very recent times that we have got into the habit of ignoring the fact that public office is and always has been regarded as a source of revenue like any other occupation. When, therefore, certain public offices are abolished for the sake of good government, a number of people are deprived of their expected income. In the older law and often in popular judgment of today this does not seem fair. But reflection shows that the state is not obligated to pay anyone when it finds that particular services of his are unnecessary. At best, it should help him to find a new occupation.

Part of the prerogative of the English or Scotch landlord was the right to nominate the priest for the parish on his land. To abolish this right of advowson is undoubtedly a confiscation of a definite property right. But while I cannot agree with my friend Mr. Laski[13] that the courts were wrong to refuse to disobey the law which subordinated the religious scruples of a church to the property rights of an individual, I do not see that there could have been any sound ethical objection to the legislature changing the law without compensating the landlord.

(c) In our own day, we have seen the confiscation of many millions of dollars of property through prohibition. Were the distillers and brewers entitled to compensation for their losses? We have seen that property on a large scale is power and the loss of it, while evil to those who are accustomed to exercise it, may not be an evil to the community. In point of fact, the shock to the distillers and brewers

[13]LASKI, STUDIES IN SOVEREIGNTY, ch. on the Great Disruption.

was not as serious as to others, *e. g.* saloon keepers and bartenders who did not lose any legal property since they were only employees, but who found it difficult late in life to enter new employments.

History is full of examples of valuable property privileges abolished without any compensation, *e. g.* the immunity of nobles from taxation, their rights to hunt over other people's lands, etc. It would be absurd to claim that such legislation was unjust.

These and other examples of justifiable confiscation without compensation are inconsistent with the absolute theory of private property. An adequate theory of private property, however, should enable us to draw the line between justifiable and unjustifiable cases of confiscation. Such a theory I cannot undertake to elaborate on this occasion, though the doctrine of security of possession and avoidance of unnecessary shock seem to me suggestive. I wish however to urge that if the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest. The owner of a tenement house in a modern city is in fact a public official and has all sorts of positive duties. He must keep the halls lighted, he must see that the roof does not leak, that there are fire-escape facilities, he must remove tenants guilty of certain public immoralities, etc., and he is compensated by the fees of his tenants which the law is beginning to regulate. Similar is the case of a factory owner. He must install all sorts of safety appliances, hygienic conveniences, see that the workmen are provided with a certain amount of light, air, etc.

In general, there is no reason for the law insisting that people should make the most economic use of their property. They have a motive in doing so themselves and the cost of the enforcing machinery may be a mischievous waste. Yet there may be times, such as occurred during the late war, when the state may insist that man shall cultivate the soil intensively and be otherwise engaged in socially productive work.

With considerations such as these in mind, it becomes clear that there is no unjustifiable taking away of property when railroads are prohibited from posting notice that they will discharge their employees if the latter join trade unions, and that there is no property taken away without due or just process of law when an industry is compelled to pay its laborers a minimum of subsistence instead of having it done by private or public charity or else systematically starving its workers.

IV

Political vs. Economic Sovereignty

If the discussion of property by those interested in private law has suffered from a lack of realism and from too great a reliance on vague *a priori* plausibilities, much the same can be said about political discussion as to the proper limits of state action in regard to property and economic enterprise. Utterly unreal is all talk of men being robbed of their power of initiative because the state undertakes some service, *e. g.* to build a bridge across a river. Men are not deprived of opportunities for real self reliance by having their streets lighted at night, by filling up holes in the pavements, by removing other dangers to life and limb and by providing opportunities for education to all. The conditions of modern life are complex and distracting enough so that if we can ease the strain by simplifying some things through state action we are all the gainers by it. Certain things have to be done in a community and the question whether they should be left to private enterprise dominated by the profit motive or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work. Both private and government enterprise are initiated and carried through by individual human beings. A realistic attitude would not begin with the assumption that all men in the government service are less or more intelligent or efficient than all those in private business. It would rather inquire what sort of people are drawn into government service and what attitudes their organization develops in contrast with that of private business. This is a matter for specific factual inquiry, unfortunately most sadly neglected. In the absence of such definite knowledge I can only venture a few guesses.

Government officials seem likely to be chosen more for their oratorical ability, popularly likeable manners, and political availability, and less for their competence and knowledge of the problems with which they have to deal. The inheritance of wealth, however, may bring incompetent people for a while into control of private business. More serious is the fact that political officials have less incentive to initiate new ventures. Political leaders in touch with public sentiment are apt to be too conservative and prefer to avoid trouble by letting things alone. Their bureaucratic underlings, on whom they are more dependent than business executives on theirs, are apt to overemphasize the value of red tape, *i. e.* to care more for uniformity of governmental procedure than for the diverse special needs to which they ought to minister. All business administration,

however, also loses in efficiency as its volume increases. On the other hand, experience has shown all civilized peoples the indispensable need for communal control to prevent the abuse of private enterprise. Only a political or general government is competent to deal with a problem like city congestion, because only the general government can coordinate a number of activities some of which have no financial motive. Private business may be more efficient in saving money. It does so largely by paying smaller wages to the many and higher remuneration to those on top. From a social point of view this is not necessarily a good in itself. It is well to note that men of great ability and devotion frequently prefer to work for the government at a lower pay than they can obtain in private employment. There is something more than money in daily employment. Humanity prefers—not altogether unwisely—to follow the lead of those who are sensitive rather than those who are efficient. Business efficiency mars the beauty of our countryside with hideous advertising signs and would, if allowed, ruin the scenic grandeur of Niagara.

The subordination of everything to the single aim of monetary profit leads industrial government to take the form of absolute monarchy. Monarchy has a certain simplicity and convenience; but in the long run it is seldom the best for all concerned. Sooner or later it leads to insurrections. It is short-sighted to assume that an employer cannot possibly run his business without the absolute right to hire and fire his employees whenever he feels like. It is interesting to note that even a modern army is run without giving the general the absolute right to hire and fire. In this connection, I recall a conversation between a British Ambassador, Sir John Malcolm, and the Shah of Persia. The latter was surprised when he learned that the king of England could not at his pleasure behead any of his courtiers. How can one be king under such conditions? However, when he learned that the king of England did not have to fear so much for his own life the Shah began to see some advantage in limiting the absolute power of the monarch. May not democratic or limited constitutional government in industry have some human advantages over unlimited monarchy?[14]

The main difficulty, however, with industrial and financial government is that the governors are released from all responsibility for the actual human effects of their policies. Formerly, the employer

[14]It used to be thought that there could be no credit transactions if the creditor could not acquire dominion over the body of the debtor in default. Yet credit is no less secure since the abolition of imprisonment for debt.

could observe and had an interest in the health and morals of his apprentice. Now, the owners or stockholders have lost all personal touch with all but few of those who work for them. The human element is thus completely subordinated to the profit motive. In some cases this even makes for industrial inefficiency as when railroads or other businesses are run by financiers in the interest of stock manipulation. Very often our captains of finance exercise power by controlling other people's funds. This was strikingly shown when several millions of dollars were paid for some shares of little inherent value but which enabled the purchaser to control the assets of a great life insurance company. Professor Ripley has recently thrown Wall Street into a turmoil by pointing out the extent to which promoters and financiers may with little investments of their own control great industrial undertakings.

Let me conclude. There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.

Now it would be unworthy of a philosopher to shy at government by captains of industry and finance. Humanity has been ruled by priests, soldiers, hereditary landlords, and even antiquarian scholars. The results are not such as to make us view with alarm a new type of ruler. But if we are entering a new era involving a new set of rulers, it is well to recognize it and reflect on what is involved.

For the first time in the history of mankind the producer of things is in the saddle, not of course the actual physical producer, but the master mind that directs the currents of production. If this is contrary to the tradition of philosophy from Plato down, we may well be told that our philosophy needs revision. Great captains of industry and finance like the late James J. Hill deal with problems in many respects bigger than those that faced Caesar and Augustus in building the Roman Empire.

Still the fear may well be expressed that as modern life is becoming more and more complex it is dangerous to give too much sovereignty to those who are after all dealing with the rather simpler aspects of life involved in economic relations.

It may, of course, rightly be contended that the modern captain of industry is not merely concerned with the creation of things, that his success is largely determined by his judgment and ability to manage large numbers of human beings that form part of his organization. Against this, however, there is the obvious retort that the only ability taken account of in the industrial and financial world, the ability to make money, is a very specialized one; and when

business men get into public office they are notably successful. Too often they forget that while saving the money of the taxpayer may be an admirable incident, it is not the sole or even the principal end of communal life and government. The wise expenditure of money is a more complicated problem than the mere saving it, and a no less indispensable task to those who face the question of how to promote a better communal life. To do this effectively we need a certain liberal insight into the more intangible desires of the human heart. Preoccupation with the management of property has not in fact advanced this kind of insight.

Many things are produced to the great detriment of the health and morals of the consumers as well as the producers. This refers not only to things that are inherently deleterious or enervating to those who create them and those who use them. It includes also many of the things of which people buy more than they need and more than is consistent with peace and leisure of mind which is the essence of culture.

It is certainly a shallow philosophy which would make human welfare synonomous with the indiscriminate production and consumption of material goods. If there is one iota of wisdom in all the religions or philosophies which have supported the human race in the past it is that man cannot live by economic goods alone but needs vision and wisdom to determine what things are worth while and what things it would be better to do without. This profound human need of controlling and moderating our consumptive demands cannot be left to those whose dominant interest is to stimulate such demands.

It is characteristic of the low state of our philosophy that the merits of capitalism have been argued by both individualists and socialists exclusively from the point of view of the production and distribution of goods. To the profounder question as to what goods are ultimately worthwhile producing from the point of view of the social effects on the producers and consumers almost no attention is paid. Yet surely this is a matter which requires the guidance of collective wisdom, not to be left to chance or anarchy.